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BEFORE THE INSURANCE COMMISSIONER  
OF THE STATE OF WASHINGTON

In the Matter of the Application regarding  
the Conversion and Acquisition of Control  
of Premera Blue Cross and its Affiliates

Docket No. G02-45

SPECIAL MASTER'S  
SCHEDULING  
RECOMMENDATION  
(JULY 7, 2003)

The Commissioner's "Eighth Order: Protective Order," at page 4, directs the me, after consulting with the parties, to address issues regarding any outstanding information requests by OIC Staff from Premera and to propose a scheduling order that includes dates for expert discovery, pre-filed testimony, hearing, and any other recommended events or procedures. (For drafting convenience, Premera and the Intervener Groups are referred to as "the parties," without prejudice to Premera's objection to the treatment of Intervener Groups as parties.) Having received the parties' oral and written input, I make the following recommendation:

Premera's Privilege Logs list documents ("privilege log documents") as to which it makes claims of attorney-client privilege or work product protection ("privilege claims"). Premera's Privilege Log Documents Crosswalks ("crosswalks") cross-reference non-privileged documents and/or information previously made available to consultants which Premera asserts to be factually similar to the privilege log documents.

OIC Staff consultants and Alaska Division of Insurance consultants assert in their June 30, 2003 submissions that many privilege log documents appear to be important to

1 their analyses of critical issues in this conversion proceeding. Such issues include, but are  
2 not limited to, tax consequences, historical tax exposures, executive compensation,  
3 conflicts of interest, accounting practices, Steering Committee analysis, alternatives to  
4 conversion, and allocation of value between Washington State and Alaska.

5  
6 Crosswalk documents are of uncertain equivalence to privilege log documents, and  
7 their asserted equivalence cannot be evaluated in the abstract. Without access to privilege  
8 log documents, the consultants' draft and final reports will be substantially qualified.  
9 Examination of the privilege logs in light of the consultants' June 30 submissions suggests  
10 that genuine issues exist as to whether certain privilege log documents fundamentally  
11 concern business issues, as opposed to being privileged communications relating to legal  
12 advice.

13  
14 The Commissioner's ultimate determinations in this conversion proceeding should  
15 be made on the fullest possible record consistent with applicable law, including the law  
16 related to privilege claims. The final reports of consultants and other experts should  
17 include as few correctable qualifications as possible. I recognize and regret that testing  
18 privilege claims may delay this proceeding and that, to the extent that Premera's privilege  
19 claims are maintained and upheld, consultants may continue to qualify their conclusions.  
20 But I believe that the integrity of this conversion proceeding, and the sustainability of the  
21 Commissioner's ultimate decisions, would best be protected by providing the opportunity  
22 for privilege claims to be tested or withdrawn before requiring draft or final consultants'  
23 reports. Permitting the record to include avoidable issues would not be in the interest of  
24 any participant in this proceeding.  
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1 Absent Premera's voluntary disclosure of privilege log documents sought by the  
2 consultants, disclosure of such documents under the auspices of the Alaska proceeding, or  
3 consideration of disclosure pursuant to another method for testing privilege claims as to  
4 such documents that may be agreed or imposed, the procedure for testing Premera's  
5 privilege claims will be as follows:  
6

7 As soon as possible, but no later than July 28, 2003, Premera will produce to me  
8 for *in camera* review all privilege log documents requested by the consultants (unless  
9 Premera's privilege claims as to such documents are accepted by OIC Staff or Premera  
10 provides such documents to the consultants). Such *in camera* submissions may include,  
11 in addition to the documents themselves, declarations or other materials providing context  
12 for the privilege log documents. Premera may, but need not, serve on the parties and file  
13 with me briefing related to its privilege claims by the same date. (Such briefing need not  
14 discuss the specific contents of individual privilege log documents.) Within one week  
15 after such *in camera* production, responsive briefing, if any, may be served and filed by  
16 the OIC Staff. Within one week after such responsive briefing, reply briefing, if any, may  
17 be served and filed by Premera.  
18

19 Following *in camera* review and consideration of any briefing submitted, I will  
20 issue a decision as to which, if any, privilege log documents Premera must disclose in  
21 whole or in part. If I determine that such rulings require production of a substantial  
22 number of privilege log documents requested by the consultants, the commencement of  
23 the case schedule will be triggered by Premera's provision of such documents for  
24 transmittal to the consultants. If I determine that such rulings do not require the  
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1 production of a substantial number of privilege log documents, the commencement of the  
2 case schedule will immediately be triggered. The case schedule will also be triggered by  
3 Premera's production of the privilege log documents sought by the consultants outside the  
4 *in camera* review process outlined above (such production to be confirmed by agreement  
5 or by me upon motion).  
6

7 I expect to recommend a case schedule to the Commissioner consistent with the  
8 above discussion, after further consultation with the Commissioner and his staff (now  
9 scheduled for July 14) as to the Commissioner's specific scheduling interests and  
10 conflicts.  
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14 Dated this 7th day of July, 2003  
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17 GEORGE FINKLE  
18 SPECIAL MASTER FOR THE  
19 INSURANCE COMMISSIONER  
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